

No. 48831-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**STEVEN WAYNE TOWER,**

Appellant.

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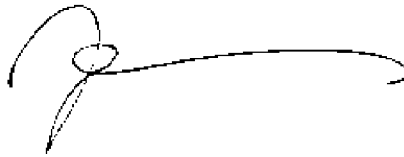
Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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JONATHAN L. MEYER  
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By:

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## **I. ISSUE**

- A. Did the trial court err when it found that Tower was committing a traffic infraction by walking along the side of the road with the flow of traffic, and that the stop of Tower in response to this infraction was valid?

## **II. STATEMENT OF THE CASE**

On December 3, 2015, Deputy Rick Van Wyck of the Lewis County Sheriff's Office was on duty traveling eastbound on State Route 508 in his patrol vehicle. RP 5-6. The road in that area was a two-lane road with no shoulder and no sidewalk. RP 5, 53. Deputy Van Wyck observed Tower walking eastbound ahead of him in the same lane, walking in the same direction as vehicles were traveling RP 6, 8.

In response to this observation, Deputy Van Wyck pulled over behind Tower and activated the patrol vehicle's back lights to alert vehicles to go around them. RP 6. Deputy Van Wyck advised Tower of the reason for contacting him and asked Tower for his identification. RP 6-7. Tower did not have identification but provided Deputy Van Wyck with his name. RP 7. Deputy Van Wyck then instructed Tower to walk on the other side of the road, facing oncoming traffic, for safety and to comply with traffic laws for pedestrians. RP 7. Tower then crossed to the other side of the road and continued walking. RP 7.

Deputy Van Wyck returned to his patrol vehicle and conducted a warrants check on the name "Steven Tower." RP 7. The namecheck came back showing that there was a warrant for Tower's arrest. RP 7. Deputy Van Wyck activated his patrol vehicle lights and recontacted Tower. RP 7. Deputy Van Wyck detained Tower, confirmed the warrant, and arrested him. RP 7. After arresting Tower, Deputy Van Wyck conducted a search incident to arrest. RP 7. During this search, Deputy Van Wyck located a clear baggie in Tower's pants pocket. RP 7-8. The baggie contained a white crystal substance, which tested positive for methamphetamine. RP 7-8.

Tower was charged with one count of Possession of Methamphetamine. CP 1-2. At a suppression hearing, Tower challenged the lawfulness of the stop. RP 17, CP 7-8. Tower testified that he had been walking on the side of the road facing traffic, contrary to the officer's testimony. RP 12. Tower stated that he walked on that side because he had been cited for walking on the wrong side of the road in the past. RP 12. Tower also testified that Deputy Van Wyck jumped out of the car and started questioning him, and that when Tower told Deputy Van Wyck his name, the deputy "threw it in park real quick and said, "You're under arrest."" RP 13.

Tower argued that he had not committed an infraction because he had been walking on the side of the road facing traffic. RP 17. Alternatively, Tower argued that even if he had been walking with traffic, the statute only requires a person to walk facing traffic “when practical.” RP 17. The State argued that the deputy’s testimony established that Tower was walking with traffic and the fact that Tower crossed the street after speaking with the deputy shows that it was practical for him to walk on the side of the road facing traffic. RP 18. The court found the deputy’s recitation of the facts to be more credible than Tower’s. RP 18-19. The court found that the deputy initially contacted Tower because he was walking on the wrong side of the road, and to correct this behavior. RP 19. The court found that this initial contact was valid and lawful and denied Tower’s motion to suppress. RP 19; CP 13-15.

After a jury trial, Tower was convicted of Possession of Methamphetamine. CP 33. This appeal follows. CP 50.

The State will supplement the facts as necessary throughout its argument below.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT CORRECTLY DENIED TOWER'S MOTION TO SUPPRESS THE EVIDENCE.**

Tower argues the trial court incorrectly denied his motion to suppress the evidence found on his person. The trial court appropriately ruled that Tower was committing a traffic infraction, and it was lawful for Deputy Van Wyck to stop him on that basis and ask for identifying information. The trial court appropriately ruled that when Deputy Van Wyck discovered that Tower had an open arrest warrant, he had a lawful basis for arresting Tower. The trial court appropriately ruled that it was lawful for Deputy Van Wyck to search Tower incident to arrest. Further, there was substantial evidence to support the finding of fact Tower has challenged, that he was committing a traffic infraction by walking with the flow of traffic. This court should find that the motion challenging the search warrant was correctly denied.

##### **1. Standard Of Review.**

When an appellant challenges a trial court's denial of a motion to suppress, the reviewing court determines whether there is substantial evidence to support the challenged findings of fact and whether those findings support the trial court's conclusions of law. *State v. Campbell*, 166 Wn. App. 464, 469, 272 P.3d 859 (2011).



Findings of fact entered by a trial court after a suppression hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).

A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

## **2. Tower Was Searched Incident To Arrest, Which Is An Exception To The Search Warrant Requirement.**

The Washington Constitution mandates that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. The article I, section 7 provision "recognizes a person's right to privacy with no express limitations." *State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). A warrantless search is per se unreasonable unless it falls within one of the few narrowly drawn exceptions. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). "[T]he search incident to arrest exception to the warrant requirement is narrower" under article I, section 7 than under the Fourth Amendment. *O'Neill*, 148 Wn.2d at 584. Under the Washington

Constitution, a lawful custodial arrest is a constitutional prerequisite to any search incident to arrest. *Id.* at 587. If the arrest is invalid, then the search incident to the arrest is invalid as well. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). A warrantless search incident to a custodial arrest may extend to the arrestee's person. *See, e.g., Thornton v. United States*, 541 U.S. 615, 626, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring) ("Authority to search the arrestee's own person is beyond question"); *State v. Whitney*, 156 Wn. App. 405, 232 P.3d 582, *review denied*, 170 Wn.2d 1004 (2010) (*Gant* does not apply to a search of a person, upon the person's arrest). The Washington Supreme Court has determined that the warrantless search of items in an arrestee's actual possession at the time of arrest is lawful even if not performed until after the arrestee is handcuffed. *See, e.g. State v. MacDicken*, 179 Wn. 2d 936, 319 P.3d 31 (2014). RCW 10.31.060 allows for arrest on a warrant by telegraph or teletype if the warrant's existence and information is verified.

Here, Deputy Van Wyck searched Tower incident to arrest after arresting him on a valid warrant. RP 7. Tower does not argue the arrest warrant was invalid, but that Deputy Van Wyck discovered

the existence of the warrant through an unlawful stop and therefore everything following the stop should be suppressed.

### **3. The Stop And Identification Of Tower Was Lawful.**

When an officer stops a person for a traffic infraction, the officer may detain that person for a reasonable period of time to identify him and check for outstanding warrants. RCW 46.61.021(2). While pretextual stops are an unconstitutional seizure, mixed motive stops may be permissible if the “officer actually and consciously makes an appropriate and independent determination that addressing the suspected traffic infraction (or multiple suspected infractions) is reasonably necessary in furtherance of traffic safety and the general welfare.” *State v. Arreola*, 176 Wn.2d 284, 297-98, 290 P.3d 983, 986 (2012). The officer does not need to issue every possible citation to guard against an eventual challenge to the constitutionality of a traffic stop allegedly based on pretext. *State v. Hoang*, 101 Wn. App.732, 6 P.3d 602 (2000).

Pedestrian offenses, such as failing to walk on the proper side of the road, are designated as traffic infractions. Pedestrians walking along highways without sidewalks “shall, when practicable, walk or move only on the left side of the roadway or its shoulder facing traffic . . . .” RCW 46.63.020. RCW 46.61.250(2).

Tower cites *Stutz v. Moody*, 3 Wn. App. 457, 476 P.2d 548 (1970) to support his argument that he was not violating RCW 46.61.250(2) by walking with the flow of traffic. Brief of Appellant 18-19.

In *Moody*, a boy was struck by a vehicle while he was walking alongside the road with the flow of traffic. *Id.* at 458. The trial court found the driver to be negligent and the boy free from contributory negligence. *Id.* at 459. On appeal, the driver contended that the boy was contributorily negligent as a matter of law because he was walking with his back to traffic. *Id.* This Court found that RCW 46.61.250(2) did not create a mandatory requirement that pedestrians walk facing traffic and that the words “when practicable” indicated there would be times when it would be more dangerous to walk against traffic than with it. *Id.* at 460. This Court held this was a question of fact to be decided by the trier of fact. *Id.* The Court found there was substantial evidence to support the trial court’s finding that it was *not* practicable for the boy to walk on the left side of the highway facing the oncoming traffic. *Id.* The boy was walking on the side of the road with a considerably wider shoulder and no obstructions whereas the left side of the road was narrower and had a steep bank and ditch overgrown with brush. *Id.* at 458. There was

evidence that school children and other pedestrians would only walk on the same side the boy used regardless of their direction of travel. *Id.* Ultimately, the Court found that RCW 46.61.250(2) did not require pedestrians to walk facing traffic when it is not practicable and gave deference to the trial court's factual finding.<sup>1</sup>

Here, there is substantial evidence in the record to show that it was practicable for Tower to walk on the side of the road facing traffic. Deputy Van Wyck observed Tower walking with the flow of traffic on a two-lane road with no shoulder and no sidewalk. RP 5-8, 53. Deputy Van Wyck stopped Tower in order to correct that behavior and have him walk on the other side of the road. RP 6-7. Deputy Van Wyck did this in part because the behavior was a violation of the statute and in part out of a concern for safety. RP 6-7. After this contact, Tower crossed the road and began walking on the side facing traffic. RP 7. Deputy Van Wyck made this contact out of a safety concern. If it were dangerous and impracticable for Tower to walk on the other side of the road, the deputy would not have directed him to do so. The fact that Tower was able to comply with Deputy

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<sup>1</sup> See also *Zook v. Baier*, 9 Wn. App. 708, 712, 514 P.2d 923 (1973), where the Division I Court of Appeals found that a pedestrian was not contributorily negligent as a matter of law where the evidence showed it was not practicable for her to walk only on the shoulder on the left side of the road in the snow under the conditions present.

Van Wyck's instruction also shows that it was practicable for him to walk on the side of the road facing traffic. These reasonable inferences were available to the court when it determined that Tower was violating RCW 46.63.020(2) when Deputy Van Wyck contacted him. The fact that Deputy Van Wyck did not detain Tower while checking for outstanding warrants, which RCW 46.61.021(2) allows, also shows that Deputy Van Wyck did not stop Tower as a pretext for obtaining his identity but actually stopped Tower for the purpose of addressing the traffic infraction.

There is substantial evidence in the record to infer it was practicable for Tower to walk on the side of the road facing traffic. This Court should affirm the trial court's finding that Tower was violating RCW 46.63.020(2) when Deputy Van Wyck contacted him and the deputy was authorized to identify Tower and check for outstanding warrants.

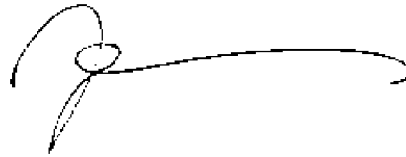
#### **IV. CONCLUSION**

Tower was violating RCW 46.63.020(2) when Deputy Van Wyck contacted him because substantial evidence shows it was practicable for Tower to walk on the side of the road facing traffic. Deputy Van Wyck therefore had lawful authority to detain Tower and check for outstanding warrants. Upon confirming an outstanding

warrant for Tower, Deputy Van Wyck had lawful authority to arrest Tower. Upon arresting Tower, Deputy Van Wyck had lawful authority to search Tower incident to arrest, where he found methamphetamine on Tower's person. This Court should affirm the trial court's findings and conclusions from the CrR 3.6 Hearing and Tower's conviction for Possession of Methamphetamine.

RESPECTFULLY submitted this 9<sup>th</sup> day of November, 2016.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney

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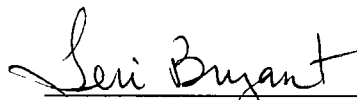
by: \_\_\_\_\_  
JESSICA L. BLYE, WSBA 43759  
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON,  Respondent,  vs.  STEVEN WAYNE TOWER,  Appellant.	No. 48831-1-II  DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Jessica L. Blye, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On November 9, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Lise Ellner, attorney for appellant, at the following email address: [LiseEllnerlaw@comcast.net](mailto:LiseEllnerlaw@comcast.net).

DATED this 9<sup>th</sup> day of November, 2016, at Chehalis, Washington.



Teri Bryant, Paralegal  
Lewis County Prosecuting Attorney Office



## LEWIS COUNTY PROSECUTOR

**November 09, 2016 - 1:36 PM**

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